

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

TERRY KIRBY,

Plaintiff,

Case No. 2:19-cv-01090

State Court Case No. D-504-CV-2019-01099

v.

UNITED PARCEL SERVICE, INC., d/b/a

UNITED PARCEL SERVICE, CO.

Defendant.

NOTICE OF REMOVAL OF CIVIL ACTION
(FEDERAL QUESTION)

**TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW MEXICO, PLAINTIFF TERRY KIRBY AND
TO PLAINTIFF’S ATTORNEY OF RECORD, CLAYTON S. HIGHTOWER AND
SANDERS LAW FIRM:**

PLEASE TAKE NOTICE THAT Defendant United Parcel Service, Inc., d/b/a United Parcel Service, Co. (“UPS”) hereby removes this action from the Fifth Judicial District Court for the State of New Mexico, County of Chaves, pursuant to 28 U.S.C. Sections 1331, 1441 and 1446 to the United States District Court for the District of New Mexico. UPS respectfully submits the following statement as the grounds for removal:

1. On October 22, 2019, Plaintiff Terry Kirby (“Plaintiff”) filed an action in the Fifth Judicial District for the State of New Mexico, County of Chavez, entitled: “*Terry Kirby v. United Parcel Service, Inc. d/b/a United Parcel Service, Co.*,” designated as Case No. D-504-CV-2019-01099 (the “Action”). The Complaint alleges the following purported causes of action: (1) the New Mexico Human Rights Act – Disability and Age; (2) the Americans with Disabilities Act, 42 USC § 12101, *et seq.*; and (3) Tort of Retaliatory Discharge. A copy of the Complaint is attached as “Exhibit A”. The allegations of the Complaint are incorporated into

this notice by reference, though UPS denies Plaintiff's allegations, and specifically alleges that he has not been damaged and is not entitled to relief.

2. On October 23, 2019, Plaintiff effected service of process on UPS via personal service by serving a summons and a copy of the Complaint. Proof of service via personal service, is attached hereto as "Exhibit B." Accordingly, all defendants have been served with the Complaint. Complaint at ¶ 2.

3. This Notice of Removal is being filed within thirty days after service on UPS of "a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based." Accordingly, removal is timely filed pursuant to 28 U.S.C. § 1446(b).

4. In accordance with 28 U.S.C. § 1446(d), UPS will, promptly after filing the Notice of Removal, give written notice of the removal to the adverse party and will file a copy of this Notice of Removal with the Clerk of the Court of the Fifth Judicial District Court for the State of New Mexico, County of Chaves.

5. Venue is proper in this District pursuant to 28 U.S.C. § 1441(a) because the Fifth Judicial District Court for the State of New Mexico, County of Chaves where the removed case was pending is located within this District.

6. This Court has federal question jurisdiction over this Action pursuant to 28 U.S.C. §§ 1331 and 1441. More specifically, this Court has original jurisdiction under 28 U.S.C. § 1331 because Plaintiff has brought a claim under laws of the United States over which this Court has original jurisdiction: the Americans With Disabilities Act, 42 U.S.C. § 12101, *et seq.* (Complaint ¶¶ 27-36). Accordingly, this action arises under the Constitution, laws, or treaties of the United States, and removal is proper under 28 U.S.C. §§ 1331 and 1441.

7. This Court has supplemental jurisdiction over Plaintiff's remaining claims, pursuant to 28 U.S.C. § 1367(a), as those claims are all so related to the claims over which the Court has original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Specifically, Plaintiff's claims for discrimination and retaliation under the New Mexico Human Rights Act (Complaint ¶ 37), and Common Law Tort

of Retaliatory Discharge (Complaint ¶¶ 38-46), arise out of and relate to Plaintiff's claims that UPS discriminated and retaliated against him in violation of federal law, based on his alleged disability. Accordingly, jurisdiction exists under 28 U.S.C. §§ 1331 and 1367(a), and removal is proper under 28 U.S.C. § 1441.

WHEREFORE, for the above-stated reasons, UPS respectfully removes this action from the Fifth Judicial District Court for the State of New Mexico, County of Chaves to the United States District Court for the District of New Mexico.

Submitted this 22nd day of November, 2019.

BURNSBARTON PLC

Electronically Filed

By: /s/ David T. Barton

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*Attorney for Defendant United
Parcel Service, Inc.*

I HEREBY CERTIFY that on the 22nd day of November, 2019, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Clayton S. Hightower, Attorney for Plaintiff (csh@sbew.com)

BURNSBARTON PLC

By: /s/ David T. Barton
David T. Barton